

Alexander Jackins (VSB #45501)  
Rhett Petcher (VSB #65826)  
SEYFARTH SHAW LLP  
975 F Street, N.W.  
Washington, D.C. 20004  
Telephone: (202) 463-2400  
Facsimile: (202) 828-5393  
ajackins@seyfarth.com  
rpetcher@seyfarth.com

David C. Christian II (Admitted *Pro Hac Vice*)  
131 South Dearborn Street, Suite 2400  
Chicago, Illinois 60603-5577  
Telephone: 312-460-5000  
Facsimile: 312-460-7000  
dchristian@seyfarth.com

*Counsel for Arboretum of South Barrington, LLC*

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION**

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In re	:	Chapter 11
	:	
CIRCUIT CITY STORES, INC., et al.,	:	Case No. 08-35653 (KRH)
	:	
Debtors.	:	(Jointly Administered)
	:	
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**ARBORETUM OF SOUTH BARRINGTON, LLC'S RESPONSE TO  
DEBTORS' NINETEENTH OMNIBUS OBJECTION TO CLAIMS  
(RECLASSIFICATION OF CERTAIN MISCLASSIFIED CLAIMS  
TO GENERAL UNSECURED, NON-PRIORITY CLAIMS)**

NOW COMES Arboretum of South Barrington, LLC ("*Arboretum*"), by and through its attorneys, and respectfully submits its Response to Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims) (Dkt. No. 3703) (the "*Objection*"), and in support thereof, states as follows:<sup>1</sup>

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<sup>1</sup> This Response is filed pursuant to the procedures set forth in the Omnibus Objection Procedures (the "*Procedures*"), approved by this Court in their entirety in, and attached as

1. On November 10, 2008, the debtors and debtors in possession in the above-captioned cases (collectively, the “*Debtors*”) filed with this Court voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

2. On December 11, 2008, the Court entered on its docket that certain Order Pursuant to Bankruptcy Code Sections 105 and 502 and Bankruptcy Rules 2002, 3003(c)(3), and 9007 (I) Setting General Bar Date and Procedures for Filing Proofs of Claim; and (II) Approving Form and Manner of Notice Thereof (Dkt. No. 890) (the “*Claims Bar Date Order*”).

3. The Claims Bar Date Order established the deadline for filing all “claims,” as that term is defined in 11 U.S.C. § 105(5), arising before November 10, 2008 against the Debtors as 5:00 p.m. Pacific time on January 30, 2009 (the “*Bar Date*”).

4. On January 29, 2009, prior to the Bar Date, Arboretum timely delivered to Kurtzman Carson Consultants LLC, the Debtors’ claims agent, its proof of claim and exhibits thereto (collectively, the “*Proof of Claim*”) in compliance with the procedures set forth in the Claims Bar Date Order. The Proof of Claim included an addendum (the “*Addendum*”), attached hereto as Exhibit A and incorporated herein by reference, in which Arboretum set forth the factual and legal bases for its claim.<sup>2</sup>

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Exhibit 1 to, its Omnibus Objection Procedures Order. As the Procedures require only “a concise statement” of why the Court should overrule the Objection as to Arboretum’s claim, Arboretum hereby reserves the right to supplement and/or amend the factual and legal support for this Response and its proof of claim stated herein.

<sup>2</sup> Arboretum’s Proof of Claim also sets forth the “Contents” required to be included in Arboretum’s response to the Objection. See Order Establishing Omnibus Objection Procedures and Approving the Form and Manner of Notice of Omnibus Objections (Dkt. No. 2881) (the “*Omnibus Objection Procedures Order*”), at Exhibit 1, pp. 3-5.

5. In the Addendum, Arboretum asserts, *inter alia*, that some or all of its claims may constitute “secured claims subject to a right of setoff against any obligations owing by the Arboretum.”<sup>3</sup>

6. On April 1, 2009, the Court entered on its docket the Omnibus Objection Procedures Order.

7. On June 22, 2009, the Debtors filed with this Court the Objection. The alleged misclassification of claims is the sole basis for the Debtors’ Objection. The Debtors attached as Exhibit C to the Objection a list of creditors and the creditors’ claims. Included on this list is a “secured” claim submitted by Arboretum in an amount not less than \$4,655,150.55.

8. Under Bankruptcy Rule 3001(f), “[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.” Thus, to succeed, any objection to such a proof of claim must make a showing to overcome that prima facie evidence.

9. The Objection here fails to make any showing, let alone one sufficient to overcome the prima facie evidence of the validity and amount of Arboretum’s claim, because the Objection merely alleges, with no support, that Arboretum’s claim is misclassified.

10. Even if the Debtors could make such a showing, and they cannot, Arboretum’s claim is, in fact, at least partially secured by a right of setoff as set forth in the Addendum.

11. “The holder of a right of setoff is considered a secured creditor under § 506(a) [of the Bankruptcy Code.]” Neal v. Golden Knights, Inc. (In re Laughter, Inc.), Adv. No. 95-4022, 1995 Bankr. LEXIS 2163, at \*13 n. 9 (Bankr. E.D. Va. Oct. 13, 1995) (attached hereto as Exhibit B); see also In re Elcona Homes Corp., 863 F.2d 483, 484-86 (7th Cir. 1988) (discussing

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<sup>3</sup> Exhibit A, at 7.

treatment of party with setoff rights as secured party under Bankruptcy Code). Arboretum is a holder of a potential right to setoff and properly filed its Proof of Claim so indicating.<sup>4</sup>

12. Accordingly, Arboretum's claim is properly classified, and the Objection should be overruled on the merits.

13. While it is true that the holder of a right of setoff is a secured creditor only "to the extent of the amount subject to setoff" and is an unsecured creditor "to the extent that the value of . . . the amount so subject to setoff is less than the amount of such allowed claim[,]"<sup>5</sup> the claim is clear on its face and awaits allowance or disallowance on the merits if and when a proper objection is filed, discovery taken, and an evidentiary hearing held.

WHEREFORE, for the reasons set forth above, Arboretum of South Barrington, LLC respectfully requests that the Court: (a) overrule the Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims); (b) allow its claim in amount not less than \$4,655,150.55; (c) award it costs and attorneys' fees; and (d) grant such additional relief as is just and proper.

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<sup>4</sup> See Arboretum's Official Bankruptcy Form 10 (attached hereto as Exhibit C); Exhibit A, at 7.

<sup>5</sup> See 11 U.S.C. § 506(a)(1).

DATED: July 14, 2009

SEYFARTH SHAW LLP

By: /s/ Alexander Jackins

Alexander Jackins (VSB #45501)

Rhett Petcher (VSB #65826)

SEYFARTH SHAW LLP

975 F Street, N.W.

Washington, D.C. 20004

Telephone: (202) 463-2400

Facsimile: (202) 828-5393

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David C. Christian II (Admitted *Pro Hac Vice*)

131 South Dearborn Street, Suite 2400

Chicago, Illinois 60603-5577

Telephone: 312-460-5000

Facsimile: 312-460-7000

dchristian@seyfarth.com

*Counsel for Arboretum of South Barrington, LLC*

**CERTIFICATE OF SERVICE**

I, Alexander Jackins, an attorney, hereby certify that on this 15<sup>th</sup> day of July, 2009, a copy of the foregoing, was mailed, first-class, postage prepaid to:

Linda K. Myers, Esq.  
Kirkland & Ellis LLP  
200 East Randolph Drive  
Chicago, Illinois 60601

Bruce Matson, Esq.  
LeClair Ryan  
Riverfront Plaza, East Tower  
951 East Byrd Street, Eighth Floor  
Richmond, Virginia 23219

Gregg Galardi, Esq.  
Chris L. Dickerson, Esq.  
Skadden Arps Slate Meagher & Flom, LLP  
One Rodney Square  
Wilmington, Delaware 19889

Lynn L. Tavenner, Esq.  
Paula S. Beran, Esq.  
Tavenner & Beran, PLC  
20 North Eighth Street, Second Floor  
Richmond, Virginia 23219

Dion W. Hayes, Esq.  
Douglas M. Foley, Esq.  
McGuire Woods LLP  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219

Robert B. Van Arsdale, Esq.  
Office of the US Trustee  
701 East Broad Street, Suite 4304  
Richmond, Virginia 23219

David S. Berman, Esq.  
Riemer & Braunstein LLP  
Three Center Plaza  
Boston, Massachusetts 02108

A copy was also served on all parties via the electronic case filing system.

By: /s/ Alexander Jackins  
Alexander Jackins (VSB #45501)  
SEYFARTH SHAW LLP  
975 F Street, N.W.  
Washington, D.C. 20004  
Telephone: (202) 463-2400  
Facsimile: (202) 828-5393  
[ajackins@seyfarth.com](mailto:ajackins@seyfarth.com)

*Counsel for Arboretum of South Barrington  
Shopping Center LLC*